receive such service, from anyone other than Colorado-Ute.

The Power Companies also point (Motion, p. 6) to the language of the Colorado Supreme Court (Motion, p. 6) to the effect that insofar as jurisdiction is concerned, "the form of organization delivering service makes no difference whatever . . .". (J.S., pp. 122-126). That such statement is not true is shown by the decision of the Colorado Supreme Court in *Public Utilities Commission* v. *Colorado Interstate Gas Company,* 142 Colo. 361, 351 P. 2d 241 (1960), wherein the Court held that a *privately-owned* wholesaler was *not* subject to the jurisdiction of the Commission, since it was *not* a public utility. It was not a public utility, said the Court, because it was not "indiscriminately serving the public." And, said the Court, to constitute public utility service, "the service must be such that all members of the public have an *enforceable right* to demand it." (Emphasis added). Under these tests it is apparent that the form of the organization indeed does make a great difference.

The Power Companies would have this Court believe (Motion, p. 7) that the same principles have been applied to Colorado-Ute as to other utilities. As shown above, such is not the case. Furthermore, the Commission expressly recognized that "investor owned utilities would be permitted to construct comparable plants *without Commission approval . . .*". (Emphasis added, J.S., p. 56). The correctness of the Commission's statement in this regard is documented by the fact that Public Service Company was at the time of the hearing and still is constructing substantial additional generating facilities in Colorado for which no Com-

mission approval was ever sought, required, or obtained, and for which no proof of public convenience and necessity was ever made. For the Power Companies to now suggest (Motion, p. 9) that the requirements of the law "fall equally upon all utilities" is belied by the conduct of Public Service Company in this regard.

Argument

As indicated in the Jurisdictional Statement, substantial federal constitutional questions are involved in this case. The Power Companies in their Motion to Dismiss divide the two questions originally presented into five particular items, but we will follow the format of the Jurisdictional Statement.

Our first contention was that Colorado-Ute is denied due process and equal protection under the 5th and 14th Amendments to the United States Constitution, by virtue of the Colorado statute which makes Colorado-Ute a public utility but denies to it the same rights and opportunities as existing utilities.

The Power Companies, refusing to meet the question presented, merely contend that the only constitutional issue presented is whether the doctrine of "regulated monopoly" is wholly arbitrary or invidiously discriminatory. (Motion, p. 9).

We have never contended that the doctrine of "regulated monopoly" is arbitrary or discriminatory. But we have contended and do contend that a statute which gives certain *existing* power suppliers preferences over other *existing* power suppliers is arbitrary and discriminatory. As we pointed out before, the

members of Colorado-Ute, under the law of Colorado, cannot be required to receive service from the Bureau of Reclamation (J.S., p. 16); but, said the Colorado Supreme Court, if they choose not to receive service from the Bureau of Reclamation, and instead choose to look to a public utility for service, they cannot go to Colorado-Ute for such service, even though Colorado-Ute has been declared to be a public utility. Instead, they must buy their power from the Power Companies, even though these companies would have to construct new facilities to serve them.[1]

The second question posed in our Jurisdictional Statement is whether Colorado law deprives Colorado-Ute of its constitutional rights under Article 1, Section 10(1) of the United States Constitution, and under the 5th and 14th Amendments, by converting it into a public utility required to serve the public, even though it has none of the attributes of a public utility.

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[1] In our Jurisdictional Statement we made the statement that the Power Companies would have to construct new facilities to meet the needs of Colorado-Ute's members. In their Motion to Dismiss, the Power Companies point to the fact that our assertion in this regard was unsupported by any record reference, and asserted that they have adequate *generating facilities to supply* all of the needs of Colorado-Ute's new members (Motion, p. 9). To dispel any further question in this regard, we merely point to the testimony of Mr. Patterson, vice-president of Public Service Company, to the effect that if his company was called upon to meet the needs that are to be served out of the Hayden Plant, it would have to step out and build the same kind of facility itself, since recent new plants (for which no certification had been obtained) were constructed not to meet these needs but to meet Public Service Company's own load growth. (C.R., p. 1915). Insofar as Western is concerned, its engineer, Mr. Bryner, testified that Western did not have the physical capacity in its system to serve the cooperatives it had served in the past. (C.R., p. 1685).

The gist of the response made by the Power Companies (Motion, p. 13) is that the many decisions of this Court declaring that the State cannot by mere legislative fiat convert one who has not dedicated his property to public use into a public utility,[2] have been undermined. The Power Companies cite in support of their contention the remarks of Judge Frank in *Fordham Bus Corporation* v. *United States,* 41 F. Supp. 712 (S.D., N.Y. 1941). While Judge Frank certainly questioned the vitality of these cases, nonetheless it is noted that Justice Douglas in *California State A. Ass'n. Inter-Ins. Bureau* v. *Maloney,* 341 U.S. 105, 71 S. Ct. 601, 95 L. Ed. 788 (1951), some ten years *after* the Fordham Bus decision, expressly pointed out that the Duke and Frost cases hold exactly as we stated earlier, to wit, "that private carriers . . . could not consistently with Due Process be converted into public carriers by legislative fiat . . .". Accordingly, we submit that while the Power Companies consider such cases to be "discredited", this Court apparently does not.

In connection with Article I, Section 10(1) of the United States Constitution, the Power Companies refer the Court (Motion, p. 14) to its decision in *El*

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[2] *Producers Transportation Co.* v. *Railroad Commission,* 251 U.S. 228, 40 S. Ct. 131, 64 L. Ed. 239 (1920);

Michigan Public Utilities Commission v. *Duke,* 266 U.S. 570, 45 S. Ct. 191, 69 L. Ed. 445 (1925);

Frost Trucking Co. v. *Railroad Commission,* 271 U.S. 583, 46 S. Ct. 605, 70 L. Ed. 1101 (1926);

Smith v. *Cahoon,* 283 U.S. 553, 51 S. Ct. 582, 75 L. Ed. 1264 (1931);

Stephenson v. *Binford,* 287 U.S. 251, 53 S. Ct. 181, 77 L. Ed. 288 (1932).

Paso v. *Simmons,* 379 U.S. 497, 85 S. Ct. 577, 13 L. Ed. 2d 446 (1965), but they do not point out that the Court there stated that a state cannot adopt a policy which permits "the destruction of contracts." As pointed out in our Jurisdictional Statement, the dissenting opinion of Justice Frantz of the Colorado Supreme Court recognized that the majority opinion of the Court "has effectively incapacitated it (Colorado-Ute) as the supplier of energy for its members." In other words, not only have the contractual rights of Colorado-Ute been destroyed, but virtually its entire business has been taken from it.

The Power Companies also make light (Motion, p. 11) of our contention that the Colorado Supreme Court violated the constitutional rights of Colorado-Ute by rejecting the Commission's express finding that public convenience and necessity required the construction of the Hayden Plant, and making its own finding to the contrary. This Court, however did not consider such a contention so lightly in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 71 S. Ct. 624, 95 L. Ed. 817 (1950), wherein it condemned arbitrary findings as being offensive to due process of law. In the instant case there was ample evidence to support the Commission's finding that public convenience and necessity required construction of the Hayden Plant, and no such evidence to support the Colorado Supreme Court's finding to the contrary.

Finally, the Power Companies assert that the question of whether Colorado-Ute is required to serve other than its members is not an issue in this case (Motion, p. 14). We disagree. Under settled public utility law,

any organization which is a public utility *must* serve all who apply for service, 43 Am. Jur., *Public Utilities and Services,* Sec. 22, p. 586. Indeed, the Attorney General of the State of Colorado has expressly held that an electric cooperative, having been declared to be a public utility, must serve all who apply for service. *Attorney General's Opinion No. 61-3536* (1961). The same opinion also holds that service to members only (such as Colorado-Ute renders and is limited to rendering) is inconsistent with the concept of a public utility. Thus, we submit Colorado-Ute may be required to serve other than its members, a burden which had not heretofore been imposed upon it.

In closing, and as we asserted by way of summary in our Jurisdictional Statement, it is submitted that the State of Colorado has, in the instant matter, first made a public utility out of a business which has not dedicated its property to public use. Having then declared such business to be a public utility, it relegates it to a second-class status inferior to all other public utilities in the state by depriving it of rights recognized and confirmed in such other public utilities. In taking such action, the State of Colorado has deprived Colorado-Ute of equal protection of the laws, due process of law, and freedom of contract.

Conclusion

The questions involving these violations of the constitutional rights of Colorado-Ute are substantial and of public importance, and the Court should hear argument concerning them.

Respectfully submitted,

JOHN A. HUGHES
P.O. Box 367
Montrose, Colorado

RAPHAEL J. MOSES
P.O. Box 34
Boulder, Colorado

R. JERRY BENNETT
P.O. Box 1149
Montrose, Colorado

JOHN J. CONWAY
802 Equitable Bldg.
Denver, Colorado

Attorneys for Appellant